IN THE HIGH COURT OF JUDICATURE AT BOMBAY
TESTAMENTARY AND INTESTATE JURISDICTION

APPEAL NO.83 OF 2007
IN
NOTICE OF MOTION NO.117 OF 2006
IN
SUIT NO.35 OF 1996
IN
PETITION NO.84 OF 1993

Thrity Sam Shroff,)
Indian Parsi, Inhabitant,)
aged about 55 years,)
permanently residing at "Roxana",)
Block No.5, 2nd Floor,)
109, M.Karve Marg,)
Mumbai - 400 020.).. Appellant

Vs.

1. Shiraz Byramji Anklesaria,)
residing at 1980,)
Convent Street, Sakar Villa,)
Camp, Pune - 411 001.)

2. Aspi Byramji Anklesaria,)
residing at 1980,)
Convent Street, Sakar Villa,)
Camp, Pune - 411 001.).. Respondents

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Shri Rustom M.Bhagalia i/b Bhuta & Associates for the Appellant.

S/Shri Gaurav Joshi with B.G.Saraf for the Respondents.

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CORAM : R.M.S.KHANDEPARKAR &
DR.D.Y.CHANDRACHUD, JJ

DATED : 7TH MARCH, 2007

JUDGMENT: (Per R.M.S.KHANDEPARKAR, J)

1. Heard. Admit. The learned advocate waives service for the respondents. By consent, heard forthwith.

2. The appeal arises from an order dated 11th January, 2007 passed by the Learned Single Judge in Notice of Motion No.117 of 2006 in Suit No.35 of 1996 in Petition No.84 of 1993. By the impugned order, the Learned Single Judge has discharged the notice of motion while imposing costs of Rs.10,000/- on the appellant. By the impugned order, the Learned Single Judge has held that in the civil suit the plaintiffs have died and it is not in dispute that the original petition was filed by them for probate of the Will of the deceased in their capacity as the executors as named in the Will, the suit abates and therefore, obviously the notice of motion in the suit, which does not remain pending for interim orders, cannot be entertained.

3. The appellant herein had taken out the said notice of motion seeking various reliefs including the relief for appointment of an Official Administrator

for administration and governance of the estate of Late B.R.B.Vakil. The said notice of motion was opposed on behalf of the respondents contending the same to be not maintainable on account of abatement of the suit while contending that the right to sue does not survive on account of death of all the executors of the Will.

4. On 23rd February, 1988, a Will came to be executed by B.R.B.Vakil and he expired on 9th October, 1989. Probate Petition No.84 of 1993 came to be filed by the Executors of the Will on 2nd March, 1993. During the pendency of the probate proceedings and by 17th October, 2005, all the five executors to the Will had expired. The appellant herein is one of the legal heirs of B.R.V.Vakil. It is her contention that the property was mismanaged and being wasted and therefore, it is necessary to appoint an Administrator consequent to the death of all the five Executors of the Will. On the other hand, it is the case of the respondents that the suit wherein the notice of motion was sought to be taken out itself had abated and therefore, the notice of motion in such a suit was not maintainable and therefore, no interference is called for in the impugned order.

5. The learned advocate appearing for the appellant, taking us through the provisions of Section 247 and Section 295 of the Indian Succession Act, 1925 and Order XXII Rule 4A of the Code of Civil Procedure and placing reliance in the decisions of the Gujarat High Court in **Jadeja Pravinsinhji Anandsinhji v. Jadeja Mangalsinhji Shivsinhji & Ors.,** reported in AIR 1963 Gujarat 32 and **Smt.Indira Vinayak Sawant & Ors. v. Mr.Vijayendra Umakant Shetye & Ors.,** reported in 2007(1) All MR 181, submitted that the contention of the respondents that the suit abates is totally devoid of substance, and in any case the Court's powers to issue an appropriate direction in the interest of protection of the estate of the deceased and for its proper distribution are not restricted, nor the provisions of the Indian Succession Act prohibit appropriate steps being directed to be taken in that regard and proper person being appointed as the Administrator in case of death of all the executors of the Will.

6. The learned advocate appearing for the respondents, placing reliance in the decision in the matter of **Manekji Manchersha Javeri v. Phiroze Boman Javeri,** reported in 1969 Vol.72 Bom.L.R. 21 as well as drawing attention to the various provisions of the

Indian Succession Act as also Rules 374 and 375 of the High Court (Original Side) Rules, 1980, submitted that consequent to the death of all the Executors the suit has abated, the proceedings for issuance of probate have come to an end and the remedy, if any, available to the appellant could be by way of the proceeding for administration of the estate.

7. Undisputedly all the executors of the Will expired during the pendency of the proceedings instituted by them for grant of probate. Being so, what is the effect of death of all the executors pending the proceedings initiated by them for grant of probate is the point for consideration in this appeal.

8. It is not in dispute that there is no specific provision in the said Act providing either for survival or abatement of the proceedings for grant of probate on the death of all the executors. However, it is the contention on behalf of the appellant that such proceeding being in the nature of suit in terms of Section 295 of the said Act, the provisions of Order XXII Rule 4A of Code of Civil Procedure are clearly attracted which contention is sought to be seriously disputed on behalf of the respondents. It cannot be disputed that in such proceeding the final

order is in the form of grant of probate, and the same is passed "in rem" and not "in personam". It is, therefore, sought to be contended that such proceedings would not abate on the death of the executors. However, referring to Section 226 of the Indian Succession Act, it is strenuously argued on behalf of the respondents that the very fact that a right to sue survives only in favour of the surviving executor or executors under the said Section, and the probate can be granted only to the executors in terms of Section 222 of the said Act, it must be held that on the death of all the executors, the proceeding for grant of probate would stand abated.

9. Section 226 of the said Act provides that when probate has been granted to several executors, and one of them dies the entire representation of the testator accrues to the surviving executor or executors. Obviously, therefore, in cases where there are number of executors, if one or more dies, the entire representation of the testator would accrue to the surviving executor or executors, as the case may be. At the same time, Sub-section (1) of Section 222 of the said Act provides that probate shall be granted only to an executor appointed by the Will. Can it be, therefore, said that in case of death of all the

executors, the testamentary proceedings for grant of probate would stand abated ?

10. Section 295 of the said Act relates to the procedure in contentious cases. It provides that such proceedings shall take form of a regular suit according to the provisions of Code of Civil Procedure. The question then is whether it would make the proceeding to be "the suit" within the meaning of the said expression under the Code of Civil Procedure and therefore the provisions of Order XXII of the Code of Civil Procedure would apply ? Section 295 of the said Act in fact reads thus:-

> "295. Procedure in contentious cases. - In any case before the District Judge in which there is contention, the proceedings shall take, as nearly as may be, the form of a regular suit, according to the provisions of the Code of Civil Procedure, 1908 (5 of 1908) in which the petitioner for probate or letters of administration, as the case may be, shall be the plaintiff, and the person who has appeared to oppose the grant shall be the defendant."

11. Undoubtedly, Section 295 of the said Act is in relation to procedure that is to be followed in respect of probate proceedings, once the same becomes contentious. The petitioner for the probate becomes the plaintiff whereas the person who opposes the grant of probate becomes the defendant and the proceedings proceed in the form of a regular suit according to the Code of Civil Procedure. The provision of law, however, nowhere states that the proceeding for grant of probate would be a suit under the Code of Civil Procedure. The framers of law, on the contrary, have cautiously used the expression "take, as nearly as may be, the form of a regular suit according to the provision of Code of Civil Procedure". Firstly, it is not stated to be a suit under the Code of Civil Procedure. Secondly, it is specifically stated that the proceedings should take the "form of a regular suit". Thirdly, it is specified to take the form of a suit "as nearly as may be" and not even fulfledge form of a suit. If the intention of framers of law was to give the character of a suit under the Code of Civil Procedure to such proceeding, then there was no need to incorporate all those expressions in Section 295 and it would have been sufficient to specify the proceeding to be a suit under the Code of Civil Procedure. Instead, the framers have specifically

clarified that the proceeding shall merely take the form of a suit according to the Code of Civil Procedure and that too as nearly as possible, meaning thereby that though the proceeding is not a suit within the meaning of the said expression under the Code of Civil Procedure, yet the provisions of the Code of Civil Procedure, to the extent they are not inconsistent with those of the said Act, may be followed bearing in mind the limited jurisdiction and function of the probate Court. We are fortified in taking this view by plethora of decisions, including those of the Apex Court.

12. In **Ishwardeo Narain Singh v. Kamta Devi & Ors.,** reported in AIR 1954 SC 280, it was held by the Apex Court that:-

> "The Court of Probate is only concerned with the question as to whether the document put forward as the last will and testament of a deceased person was duly executed and attested in accordance with law and whether at the time of such execution the testator had sound disposing mind. **The question whether a particular bequest is good or bad is not within the purview of the Probate Court."**

(Emphasis supplied)

13. In **Chiranjilal Shrilal Goenka (deceased) through LRs. v. Jasjit Singh & Ors.,** reported in (1993)2 SCC 507, the Apex Court held that:-

> "....the only issue in a probate proceedings relates to the genuineness and due execution of the will and the court itself is under duty to determine it and preserve the original will in its custody. **The Succession Act is a self-contained code insofar as the question of making an application for probate, grant or refusal of probate or an appeal carried against the decision of the probate court.** This is clearly manifested in the fascicule of the provisions of the Act. **The probate proceedings shall be conducted by the probate court in the manner prescribed in the Act and in no other ways.** The grant of probate with a copy of the will annexed establishes conclusively as to the appointment of the executor and the valid execution of the will. Thus it does no more than establish the factum of the will and the legal character of the executor. Probate court does not decide any

question of title or of the existence of the property itself." (Emphasis supplied)

14. The Apex Court in **Chiranjilal Shrilal Goenka's case (supra)** further reiterated the settled principle of law that the consent cannot confer jurisdiction, nor there is an estoppel against statute, and held that:-

"the jurisdiction can be exercised only when provided for either in the Constitution or in the laws made by legislature. Jurisdiction is thus the authority or power of the Court to deal with a matter and make an order carrying binding force in the facts."

It was further warned that the Court cannot confer a jurisdiction on itself which is not provided in the law.

15. In **Delhi Development Authority v. Mrs.Vijaya C. Gurshaney & Anr.,** reported in 2003 AIR SC 3669, the Apex Court held that :-

"A Testamentary Court is only concerned with finding out whether or not the testator

executed the testamentary instrument of his free will. **It is settled law that the grant of a Probate or Letters of Administration does not confer title to property.** They merely enable administration of the estate of the deceased." (Emphasis supplied)

16. The Calcutta High Court in **Sushila Bala Saha v. Saraswati Mondal,** reported in AIR 1991 Calcutta 166, it was held that :-

"the Probate Court cannot go into the question of title, the Probate Court is not to be influenced by any agreement of the parties and if the Will was duly executed and the maker of the Will was of sound and disposing state of mind, then the Probate should be granted to that Will."

17. While holding as above, the Division Bench of Calcutta High Court had relied upon its earlier decision in **A.E.G. Carapiet v. A.Y.Derderian,** reported in AIR 1961 Cal 359, wherein it was held that:-

"The testamentary rules and probate practice

> in this court do not seem to indicate that there is such a procedure available here for making such terms of settlement a rule of the court. But nevertheless, it has formulated a practice, consistently followed, almost without exception, of making the terms if not a rule of the court but a record on the file of the court. That does not mean that these terms become a part of the grant or refusal of the probate or executable as such. But it only means this that the records of the court will show that the interested parties had arranged to dispose of the property according to such agreement when it reaches their hands, but then such agreement does not thereby become executable as a decree of court but can only be enforced by independent proceeding or suit in the ordinary way as an agreement."

18. In **Balai Lall Banerjee & Ors. v. Debaki Kumar Ganguly & Ors.,** reported in AIR 1984 Calcutta 16, it was held that:-

> ".....a proceeding for grant of Probate or Letters of Administration is not strictly a suit though in some cases where the grant is

> opposed it is deemed as such. That, in our view is only for the purpose of classification of the proceeding without changing its character. The order passed in such a proceeding may have the force of a decree but strictly it is not a decree not having been passed in a suit."

19. In **Fr.V.M.Skaria & Ors. v. K.T.George & Ors.,** reported in AIR 1999 Kerala 320, it was held that :-

> "The language of S.295 of Succession Act is not precise enough to convert an appeal against such an order into a regular suit. In view of the words "as nearly as may be" and "form of a regular suit" in S.295, even where the probate proceedings become contentions, they are merely to assume the form of a regular suit though in reality they are not in the nature of a regular suit under the Civil P.C."

Before arriving at the above conclusion, it had referred to Full Bench decision of Allahabad High Court in **Panzy Ferhantus v. M.F.Queoros, AIR 1963 All**

153(FB), wherein it was held that:-

> "The order on a petition for letters of administration under S.278 of the Succession Act is not a decree as the order is not passed in a suit. Proceedings for letters of administration under the Succession Act are not commenced by the institution of a plaint. On the other hand, as Section 278 of the said Act shows, they are commenced by an "application" or a "petition". The decision appealed against is described in S.299 as an "order", and not a decree."

20. In **Smt.Multivahuji w/o Goswami Goverdhaneshji Girdharlalji v. Smt. Kalindivahuji & Ors.,** reported in AIR 1994 Gujarat 42, it was held that :-

> "Once the proceeding becomes contentious Sec.295 provides that they shall take, as nearly as may be, the form of a regular suit. The word "as nearly as may be" undoubtedly suggest that as far as possible such proceeding is to be treated as a suit governed by the provision of the Code of Civil Procedure. .....However,

> the limitations or restrictions under which the probate Court is acting shall remain and the Civil Court even while trying the proceeding as civil suit shall act within its limited jurisdiction."

21. The Patna High Court in **Sidhnath Bharti (Objector) v. Jai Narayan Bharti,** reported in AIR 1994 Patna 144, held that:-

> ".....contentious proceeding is not a suit in the point of fact and substance. On the other hand, for the purpose of classification of the proceeding after it becomes contentious, it is treated as suit in form only. An order passed in such a proceeding is not a decree nor there is any requirement in law to draw up a decree after a contentious proceeding is decided by passing a final order."

22. In **Barumal Singh v. 3rd Additional District Judge, Saharanpur, & Ors.,** reported in AIR 1986 Allahabad 307, the Allahabad High Court held that the provisions of Order 22 Rule 3 of the Code of Civil Procedure do not apply to the proceedings under Part VII of the Indian Succession Act and right to sue in

such proceedings does not survive, and therefore, the application under Section 192 of the said Act filed by the widow of the deceased in regard to the estate of the deceased was not maintainable and there could not be substitution as such. In that regard, reliance was sought to be placed in the decision of Patna High Court in **Deo Kumar Singh v. Kailash Singh,** reported in AIR 1961 Patna 304, wherein, it was held that on the death of the applicant for a succession certificate, the proceeding lapses and there could be no substitution of the heirs of the alleged heirs of the applicant. Relying upon the said ruling, it was held by the Allahabad High Court that unless the right to sue survives, it is not open to the applicant to make an application for substitution in proceedings under the said Act.

23. In **Sarat Chandra Banerjee v. Nani Mohan Banerjee,** reported in 1909 Vol.III Indian Cases 995 (Calcutta), pending the hearing of a contested application for probate by a sole executor, the executor died and his widow as legal representative applied that her name may be substituted for the deceased executor and that the petition for probate may be amended by substituting a prayer for letters of administration. The said application came to be

rejected on the ground that the right to sue does not survive and the suit had abated.

24. In **Hari Bhusan Datta v. Manmatha Nath Datta & Ors.,** reported in 1919 (Vol.II) Indian Cases 76 (Calcutta), a residuary legatee under a Will had applied for grant of Letters of Administration to the estate of the testator with the copy of the Will annexed. However, during the pendency of the application he died leaving his son as his heir and legal representative. The latter applied to be substituted in the place of his deceased father and to be granted Letters of Administration with the copy of the Will annexed. It was held that a right of legatee to obtain a grant was a personal right and it does not devolve on his heir.

25. In **Manekji Manchersha Javeri's case (supra)**, while dealing with the application for substitution of the applicant in place of the deceased petitioner and for that purpose to make necessary amendment in the petition for probate, it was held that an application for obtaining the grant does not place an executor in any situation similar to the one contemplated by O. I, r.8 of the Civil Procedure Code, as he does not represent anybody when he makes that application. It

was further held that:-

> ".....in the case of an application for probate no question of any right to sue arises at all. No doubt, when one of several executors or administrators dies, "all the powers of the office become vested in the survivors" as laid down in s.312 of the Succession Act. That, however, is very different from saying that the right of an executor to apply for probate is a right to sue, or that when an executor dies pending application for probate a right to sue survives. First and foremost, it must be borne in mind that when a petition is filed on the testamentary side for the grant of representation, it is not a suit in any sense of the word; and secondly, if it remains non-contentious, it never assumes even the form of a suit. When a petition becomes contentious, what rule 710 of the Rules of this Court lays down is that, upon an affidavit in support of the caveat being filed, the proceedings are to be numbered as a suit and the procedure therein should, as nearly as may be, be according to the

> provisions of the Code of Civil Procedure. Section 295 of the Succession Act enacts that the proceedings then take, as nearly as may be, "the form of a regular suit". That, however, does not actually make the proceedings a suit in the real sense of the term, and no question of the right to sue surviving on the death of the executor arises, even though the executor dies after the testamentary proceedings have become contentious."

26. In **Chandramani Maity v. Bipin Behari Sasmal & Ors.,** reported in AIR 1932 Calcutta 206, undoubtedly, the Calcutta High Court, after observing that it is true that the right to obtain probate of a will does not survive, held that "in an appeal in a case where the judgment appealed against may operate as one in rem, different considerations will arise", and on that count, it had allowed the application for substitution in an appeal. However, the judgment nowhere discloses any discussion for arriving at the said conclusion apart from saying that a person who was allowed to be substituted could be one of the legal representatives of the deceased, on whose death in relation to the Will executed by him probate proceedings were

initiated.

27. The Learned Single Judge of Gujarat High Court in **Jadeja Pravinsinhji Anandsinhji's case (supra),** has held that the action of an executor in applying for a probate is not in substance a personal action and that therefore the maxim actio personalis moritur cum persona would not apply to such a case, and therefore, the application for substitution in probate proceeding was allowed. In that regard, the Learned Single Judge of Gujarat High Court has referred to some of the decisions of different High Courts, and has held that:-

> "The position of a petitioner for probate is thus somewhat similar, though not exactly the same, as a plaintiff under O.I R.8 of the Civil Procedure Code. A plaintiff under O.I, R.8 Civil Procedure Code has a common interest between himself and the persons whom he represents. In the case of a petition for probate, there is a common interest between the executor and other persons interested in the will of the deceased in propounding the will. If under Order I Rule 8, any of the persons whom the plaintiff represents can

> intervene, I do not think that in a petition for probate, a legatee or a beneficiary under the will, on a proper case being made out, cannot be allowed to intervene at any stage and to come on the record."

Apparently, the Learned Single Judge of Gujarat High Court has proceeded on the basis that the probate proceeding is a suit within the meaning of the said expression under the Code of Civil Procedure which is contrary to the very statutory provision comprised under Section 295 of the said Act and the law laid down in that regard by the Apex Court, and even by the Gujarat High Court in **Smt.Multivahuji's case (supra).**

28. Similarly, in **Sarat Chandra Banerjee's case (supra)**, it was held that in a case where pending the hearing of a contested application for probate by a sole executor, the executor died and his widow as legal representative applied that her name may be substituted for his and that the petition for probate may be amended by substituting a prayer for letters of administration, the same was held to be not maintainable and was liable to be rejected because the right to sue did not survive and the proceedings had abated.

29. In **Kamalamma v. Somasekharappa,** reported in AIR 1963 Mysore 136, it was held that :-

> "The representative capacity of the executor or of the administrator is quite evident in that whether he has any personal interest or not as a legatee under the will he is certainly entrusted with the management of the estate for the benefit of all those legatees who get an interest under the will. Their Lordships therefore came to the conclusion that a person who becomes an heir to the legatee will be a legal representative and would be competent to continue a proceeding started by an executor."

Reliance was placed in the decisions in the matters of **Chandramani v. Maity v. Bipin Behari Sasmal & Ors.,** reported in AIR 1932 Cal 206 and **Rama Naidu v. Rangayya Naidu,** (AIR 1933 Mad 114) of Madras High Court. At the same time, it was also observed that the distinction between an administrator and an executor is that the former derives his authority under the Will while the latter gets that authority to represent the estate under the orders of the Court.

It was further observed that it is beyond the competence of a Court of probate jurisdiction to consider questions relating to title to property or of satisfaction of claims arising under the Will. The Mysore High Court rather proceeded on assumption that the provisions of Order XXII read with Section 2(11) of the Code of Civil Procedure are applicable to the probate proceeding. The scope and effect of Section 295 of the said Act does not appear to have been considered in the matter. With respect, we are unable to persuade ourselves to agree with the said view.

30. Considering all the above decisions, it is abundantly clear that the probate proceeding, though on being contested, becomes contentious proceeding, and therefore, it is to be proceeded in the form of a suit, but that by itself does not transform the proceeding into a suit under the Code of Civil Procedure. The provisions of Code of Civil Procedure would apply to such proceedings to the extent they are not inconsistent with the provisions of law comprised under the said Act. Section 226 of the said Act specifically provides that in case of death of an executor, representation would survive to the surviving executor or executors, as the case may be. At the same time, Section 222 clearly specifies that

the probate can be granted only to an executor. In other words, the probate proceedings are essentially at the instance of the executors so named in the Will, and can survive till the executors survive. Moment the sole executor dies or all the executors die, the question of proceeding being kept alive does not arise at all, as there would be no occasion in such a case to grant any probate. Such a proceeding would die a natural death as a consequence of non survival of any executor. In such circumstances, the question of applicability of Order XXII of the Code of Civil Procedure does not arise at all.

31. Merely because the proceeding may be appearing to be in the form of a representative character in relation to the execution of the Will of the deceased, that by itself will not make the proceeding to be a representative suit within the meaning of the said expression under the provisions of the Code of Civil Procedure. Order I Rule 8 of the Code of Civil Procedure which deals with the concept of a representative suit speaks of representation of interest of numerous persons and not the numerous interest of same person. Merely because the probate proceedings may relate to numerous properties of the deceased person, having so covered by the Will

executed by the deceased person, that will not transform the proceeding into a representative suit within the meaning of the said expression as understood under Order I Rule 8 of the Code of Civil Procedure.

32. Once it is clear that the proceeding does not survive on the death of last surviving executor, such proceeding is bound to abate. The question of entertaining any application for substitution in an abated proceeding cannot arise, till and until the abatement is set aside. The question of setting aside the abatement would arise only in a case where right to sue survives and sufficient case is made out by moving the Court to set aside the abatement and to bring the legal representatives on record. Once it is clear that in a probate proceeding, there is no right to sue which can survive, the question of setting aside of the abatement does not arise. Once the abatement cannot be set aside, it means, proceeding cannot be revived. Once a proceeding is dead, the question of entertaining any application therein does not arise. Hence, the contention about the substitution of the deceased executor and thereafter transforming the proceeding into a proceeding for Letters of Administration does not arise.

33. The question of transformation from one form of proceeding into another form of proceeding would arise only when the proceeding in the first form is surviving or pending. In a case where the proceeding itself has abated and is neither surviving nor pending, the question of transforming the same into another form does not arise.

34. It is well settled that merely because the provisions of Code of Civil Procedure are made applicable to a proceeding, that by itself will not transform such proceeding into a suit within the meaning of the said expression under the Code. The Apex Court in **Diwan Brothers v. Central Bank of India,** reported in AIR 1976 SC 1503 while dealing with the decision of a Tribunal under Displaced Persons (Debts Adjustment) Act, 1951 which is referred therein as a decree, held that it would not be a decree within the meaning of Section 2(2) of Code of Civil Procedure or of Schedule II, Article 11 of the Court Fees Act, 1870, nor the proceeding before the Tribunal would be a suit merely because the provisions of the Code of Civil Procedure are made applicable to such proceedings.

35. Besides, as observed by Justice Vimadalal in **Manekji Manchersha Javeri's case (supra)**, the right of a person to obtain a grant of Letters of Administration is quite different from the right of a person who derives title as Executor under a Will to obtain a grant of Probate. The averments which would be necessary for an application in the proceeding for letter of administration may not be necessary in the case of an application for the grant of probate by a person named in the Will as executor. This is evident from comparison of the provisions of Section 276 with Section 278 of the said Act read with Rules 374 and 375 of the Bombay High Court Original Side Rules.

36. As regards Rule 4A of Order XXII of the Code of Civil Procedure is concerned, it would have no application to such proceedings. Firstly that the right to sue does not survive in such proceeding. Secondly the said rule applies to "suits" within the meaning of the said expression under the Code of Civil Procedure and not to proceedings like those for grant of probate. Thirdly, Section 226 read with Section 222 of the said Act clearly indicates that the proceeding would abate on the death of all the executors. Being so, in probate proceedings, the provisions of Order XXII Rule 4A of the Code of Civil

Procedure are not attracted.

37. For the reasons stated above, therefore, no fault can be found with the impugned order dismissing the notice of motion taken out by the appellant in a proceeding which has already abated consequent to the death of all the executors. However, the appellant is justified in contending that the imposition of costs of Rs.10,000/- while dismissing the notice of motion cannot be justified and needs to be set aside.

38. The appeal, therefore, partly succeeds. While the challenge to the dismissal of the notice of motion is rejected, the impugned order to the extent it imposes the costs of Rs.10,000/- is set aside. The impugned order, therefore, stands modified to that extent and the appeal stands disposed of accordingly, with no order as to costs.

(R.M.S.KHANDEPARKAR, J)

(DR.D.Y.CHANDRACHUD, J)